Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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| AT&T Corp. Petition for Declaratory Ruling that Ameritech Ohio's Dialing Parity Cost Recovery Mechanism Violates 47 C.F.R. § 52.215 | ) ) ) ) | CC Docket No. 96-98 File No. NSD-L-00-06 |

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# AMERITECH OHIO'S COMMENTS

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1. Summary

AT&T provides no rational basis for this Commission to upset the delicate balance crafted by the Public Utilities Commission of Ohio in this case. AT&T complains that the Ohio Commission's Guideline, under which Ameritech Ohio has implemented its cost recovery mechanism, violates both Section 51.215 of this Commission's rules (47 CFR § 51.215) and the Second Local Competition Order, 11 FCC Rcd. 19392 (1996). AT&T, p. 1. Only a strained interpretation can lead to this conclusion.

Ameritech Ohio submits that AT&T's petition is barred by the equitable doctrine of laches, on which this Commission has relied in the past to address untimely challenges to actions on which other parties have relied.

If the Commission addresses the petition on the merits, Ameritech Ohio demonstrates herein why the Ohio Commission's approach is consistent with both the language and, more importantly, the policy underlying this Commission's approach to the cost recovery mechanism. Moreover, to grant AT&T's petition would be to single out Ameritech Ohio for disparate treatment among the other Ohio ILECs that followed the Ohio Commission's reasonable interpretation. The Commission should therefore not

disturb the Ohio Commission's orders or the actions Ameritech Ohio has taken pursuant to those orders.

2. Background

This case involves the implementation of intraLATA 1+ presubscription by Ameritech Ohio and the cost recovery method ordered by the Ohio Commission in connection with that task. AT&T challenges the Ohio Commission's policy, claiming it is in conflict with this Commission's policy and rules.

It is important in this context to understand the development of the Ohio Commission's policy in connection with the challenged cost recovery mechanism. In November, 1996, the Ohio Commission adopted Guidelines in its generic local competition docket, Case No. 99-845-TP-COI. Guideline X addressed the requirements for local exchange carriers to implement dialing parity and 1+ intraLATA presubscription. The Guideline prescribed a timeframe for that implementation as well as the methodology and procedures governing that implementation. The Guideline also addressed the recovery of the LECs' costs of implementation of intraLATA dialing parity. Specifically, Guideline X.F provided as follows:

> The incremental costs directly associated with the introduction of intraLATA dialing parity shall be borne by providers of telephone exchange service and telephone toll service. Costs shall be recovered through a Commission-approved switched access per minute of use charge applied to all originating intraLATA switched access minutes generated on lines that are presubscribed for intraLATA toll service. Recovery of these costs shall not include recovery of costs

incurred for PIC changes during the initial 90-day no-charge period.

See, AT&T Attachment A.

The last sentence of this Guideline is important in the consideration of the issue presented by AT&T's petition. Through this requirement, the Ohio Commission forced the ILECs to absorb the costs of PIC changes for the first 90 days after the advent of presubscription. Guideline X.E.1 provided in part that "(i)nitial requests of current subscribers for an intraLATA carrier change will be provided free of charge for the first 90 days after customer notice was originally sent." Similarly, customers who informed their LEC of their intraLATA toll carrier selection at any time within the 90-day period were not assessed a service order charge for their initial PIC request. Guideline X.E.4 (see, AT&T Attachment A).

Following the adoption of its initial Guideline on November 7, 1996, the Ohio Commission considered applications for rehearing and issued its final Guidelines on February 20, 1997. Guideline X.F was not changed in this latest iteration of the Guidelines. The language of the Guideline stands unchanged today.

IntraLATA 1+ presubscription was initiated by Ameritech Ohio's filing of an application including a proposed tariff on

December 12, 1996, following the adoption of Guideline X. Following Ameritech Ohio's discussions with the Ohio Commission Staff, the tariff application was amended on November 7, 1997, consistent with the Staff's recommendations. On January 14, 1999, the Ohio Commission adopted its Finding and Order approving the application, with the exception of the implementation cost recovery MOU rate, which was to be established later. PUCO Case No. 96-1353-TP-ATA, Finding and Order, January 14, 1999, p. 3. The Finding and Order specified that the case would remain open until the MOU rate for cost recovery was effective. Id. On February 1, 1999, Ameritech Ohio filed its revised tariff sheets in accordance with the Finding and Order, which carried an effective date of February 8, 1999. IntraLATA 1+ presubscription was effective throughout Ameritech Ohio's exchanges on that date. On February 1, 2000, consistent with the Finding and Order, Ameritech Ohio filed its tariff application proposing to establish its minute of use rate at $0.005121, slightly over one-half cent per minute. AT&T filed a motion to suspend that tariff application on February 10, 2000.

Relevant to this case is the Ohio Commission's treatment of many other ILECs that were required to implement intraLATA 1+ presubscription pursuant to Guideline X. With respect to those other ILECs, three IXCs, including AT&T, unsuccessfully challenged the Ohio Commission's approach to intraLATA 1+ presubscription cost recovery in 1998. Failing in

that venue, AT&T appealed the Commission's orders to the Ohio Supreme Court, but withdrew that appeal in 1999. Thus, every other ILEC that opted to follow the presubscription cost recovery methodology set forth in Guideline X.F, as interpreted by the Ohio Commission, has been permitted to do so and recover its costs accordingly.

Also relevant to this case is the Ohio Commission's discussion of its rationale underlying its balanced and reasonable policy decision concerning cost recovery. In its Finding and Order adopted on October 8, 1998, the Ohio Commission denied the motions filed by Sprint, MCI, and AT&T which sought to invalidate the 28 other ILECs' calculations of 1+ presubscription implementation costs. PUCO Case No. 95-845-TP-COI, Finding and Order, October 8, 1998 (See, AT&T Attachment B). These ILECs did not include their own minutes, as the "default" carriers, in assessing the charges for the recovery of those costs. The IXCs challenged this under Guideline X.F, which provides that the charge should be applied to all originating intraLATA switched access minutes generated on lines that are presubscribed for intraLATA toll service. The other ILECs had argued, among other things, that the lines they retain as the default carrier are not "presubscribed."

The Ohio Commission said that its intent was that the total costs caused by the implementation of intraLATA toll

presubscription be shared by both the LECs and the IXCs. Id., p. 4. It said that because the LECs are likely to have significant revenue losses and because the Commission prohibited LEC cost recovery for the initial 90-day presubscription period, the LECs are, indeed, sharing in the costs. Id., pp. 4-5. The Commission also agreed with the LECs' view that customers who retain the LECs' intraLATA toll by "default" (i.e., no action on the customer's part) are not "presubscribed." Id., p. 5.

The Commission clarified Guideline X.F by stating that the MOU rate for intraLATA toll implementation cost recovery does not need to be calculated using the intraLATA switched access minutes of the LEC. Id., pp. 5-6. It added that LECs may include their minutes, as GTE has done, but that they are not required to do so. Id., p. 5. AT&T and MCI challenged the Ohio Commission's conclusions in their joint application for rehearing filed on November 9, 1998. In a thorough and well-reasoned order, the Ohio Commission denied rehearing on December 9, 1998. See, AT&T Attachment C.

3. AT&T's Petition Should Be Barred

While AT&T recounts the history of the Ohio Commission's rule about which it complains, it offers no real reason why it has waited so long to launch this attack. Its delay prejudices both the Ohio Commission and Ameritech Ohio.

Its petition, therefore, should be barred by the equitable doctrine of laches.

The Commission has recognized and invoked this doctrine in appropriate circumstances. Western Union International, 70 FCC2d 1896, 1903 (1979); Indiana Mobile Telephone Corporation, 2 FCC Rcd 6272 (1987). AT&T's real complaint goes to the Ohio Commission's October 8, 1998 order. AT&T offers no excuse why it waited over one year from the date of that order to file its petition here.

The facts here clearly show that Ameritech Ohio has been prejudiced by AT&T's inexcusable delay in asserting a known right. As explained in more detail below, Guideline X.F has been followed by most of the other ILECs in Ohio with the Ohio Commission's direction and blessing. It is being followed currently by Ameritech Ohio. The other LECs have implemented their cost recovery mechanisms consistent with the Guideline and have collected rates pursuant to those tariffed mechanisms. During this time period, AT&T's previous assaults on the Ohio Commission's interpretation of the Guideline have been rejected or have been withdrawn by AT&T.

It was only when Ameritech Ohio, the last of the ILECs to do so, was about to implement the charge authorized by the Ohio Commission that AT&T filed its petition. Granting AT&T's

petition would unreasonably discriminate against Ameritech Ohio vis à vis the other Ohio ILECs that followed the Ohio Commission's interpretation. Granting the petition would also prejudice the Ohio Commission's efforts to not create undue advantages or preferences for one telephone company to the exclusion of others. See, Ohio Rev. Code §§ 4927.03 and .04. The Commission should rule, therefore, that the equitable doctrine of laches bars consideration of AT&T's complaint at this late date.

4. The Ohio Commission's Guideline is Reasonable

Even if the Commission addresses AT&T's petition on the merits, the record demonstrates that the Ohio Commission's Guideline is eminently reasonable and fair. With the adoption of the Guideline X.F, its reaffirmation on rehearing, and its application in the cases of many of the other ILECs, the Ohio Commission sought to achieve a competitively-neutral balance. First, it recognized that the incumbent LECs faced significant risk of the loss of intraLATA market share and associated revenues. Second, it recognized that it was requiring the ILECs to absorb the costs associated with the Commission-ordered waiver of the PIC change charge during the first 90 days after implementation of intraLATA 1+ presubscription. These factors, which are given short shrift by AT&T, are key to the Ohio Commission's analysis of the equities involved here.

AT&T argues that the Ohio Commission-approved cost recovery mechanism is not competitively neutral because it places competitive LECs and IXCs at a significant cost and competitive disadvantage vis à vis the ILECs. AT&T, p. 4. This claim deserves close scrutiny. First, the mechanism does not violate the principle of competitive neutrality because of the offsetting factors noted above. With the advent of intraLATA 1+ presubscription, the ILECs could be expected to lose significant market share and revenues associated with their intraLATA toll service. Second, the Commission-ordered waiver of the PIC change charge would clearly be an unrecovered cost to the ILECs. The Ohio Commission properly balanced these factors in developing its prescribed cost recovery mechanism.

AT&T's claim of a significant cost and competitive disadvantage also rings hollow when examined closely. The charge that Ameritech Ohio has proposed in its tariff filing made pursuant to the Commission's Guideline on February 1, 2000, is $0.005121, slightly over one-half cent per minute. The charge is to be applied to originating intraLATA switched access minutes of use generated on lines that are presubscribed for intraLATA toll service. The charge is proposed to remain in effect for three years. The charge applies to all IXCs on a non-discriminatory basis. The charge, though, for the reasons explained above, does not apply to the minutes of use on lines that are not "presubscribed for intraLATA toll service." Thus, the charge

does not apply to the lines of customers who took no affirmative action once the option of intraLATA 1+ presubscription was presented to them. These lines are not properly considered to be "presubscribed" for this purpose.

AT&T's argument that Ameritech Ohio is given an appreciable cost advantage also ignores another important fact. Under Ameritech Ohio's alternative regulation plan, the Company must impute the costs associated with the MOU charge in establishing the cost floor for its intraLATA toll service. Thus, the charge must be considered in establishing Ameritech Ohio's intraLATA toll rates. This requirement of the Company's alternative regulation plan, as prescribed by the Ohio Commission, serves to minimize the competitive impact claimed by AT&T.

Section 51.215 of the rules provides that "(t)he LEC shall use a cost recovery mechanism established by the state." In establishing that mechanism, the rule provides that the state may not give one service provider an appreciable cost advantage over another service provider. AT&T assumes, but does not show, that by not charging itself a $0.005 per minute charge, Ameritech Ohio is somehow enjoying an "appreciable cost advantage." The reality is in contrast to AT&T's claims. The fact that there is no "appreciable cost advantage" is clearly shown when one considers, as noted above, the revenue the IXCs will gain over

the three-year cost recovery period and the revenue that Ameritech Ohio will lose during the same three-year period. Secondly, Ameritech Ohio has been provided no mechanism by which to recover the costs of the mandatory temporary waiver of the 2-PIC change charge.

AT&T's assumption also ignores the circumstances of the customers that have elected to keep Ameritech Ohio as their intraLATA 1+ toll provider. Those customers, who did not make a change, should not be asked to subsidize the customers that elected to have IXCs carry their intraLATA toll traffic.

The Ohio Commission's Guideline reflects a fair and reasonable approach to the equities of the situation. The Ohio Commission stated its intent to have 1+ presubscription costs shared by both the LECs and the IXCs. PUCO Case No. 95-845, Finding and Order, October 8, 1998, p. 4. This sharing approach is reflected in, and justified by, the loss of revenue and the waiver of the presubscription change charges - - both items on the ILEC side of the ledger. The Commission also recognized that by opening the intraLATA 1+ presubscription toll market to the IXCs, the IXCs would attract significant revenues that were once unobtainable. There are costs on both sides of the ledger - - that of the IXCs and that of the ILECs. The Ohio Commission's approach to equitably allocate the cost responsibility should not be second-guessed by this Commission.

Under these circumstances, requiring the IXCs to bear the 1+ implementation costs cannot be considered an appreciable cost disadvantage to them. For its part, Ameritech Ohio is burdened with the long-term loss in intraLATA 1+ revenue and with the waiver of the 2-PIC change charges.

The history described above reveals another pertinent fact ignored by AT&T. AT&T's approach here would single Ameritech Ohio out for disparate treatment among Ohio ILECs. In general, Guideline X.F has been followed by other ILECs in Ohio, with the Ohio Commission's direction and blessing. AT&T sought to challenge the other LECs' approach in an appeal of the Commission's orders, but withdrew that appeal. Those other LECs have implemented their cost recovery mechanisms consistent with the Guideline and have collected rates pursuant to those tariffed mechanisms. Thus, Ameritech Ohio would be singled out for disparate treatment if the Guideline is not applied to it in the same manner it has been applied to the other ILECs. This is yet another reason to leave the Ohio Commission's policy undisturbed.

5. Conclusion

For these reasons, the Commission should find that AT&T's petition is barred by the equitable doctrine of laches. If it reaches the merits of that petition, however, the Commission should find that the Ohio Commission's approach here, which Ameritech Ohio has followed, is permissible under the

Commission's rule and policy. In so doing, the Commission should deny AT&T's petition.

Respectfully submitted,

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Certificate of Service

I hereby certify that a copy of the foregoing Comments has been served this 14th day of February, 2000, by first class mail, postage prepaid, on the parties shown below.

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